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No. 709

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In the

Supreme Court of the United States

OCTOBER TERM, 1965

CATHERINE MUTH, Administratrix of the Estate of Clem Muth, deceased,

Petitioner,

vs.

HARRIET ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. Leslie Atlass,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI WITH ADDITIONAL APPENDIX.

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The Scheffer Press, Inc.—ANdover 3-6850

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The joint brief in opposition filed herein and in No. 733, entitled "Reply to Petitions for Certiorari," discloses no matter or grounds why the cause should not be reviewed by this Court. The brief fails to comply with paragraphs 3 and 5 of Rule 40.

1. The petition does not violate paragraph 4 of Rule 23.

Respondents characterize the petition as containing "extravagant and unwarranted assertion and assumption," "insinuation," "incorrect and elided statements," and as being "merely fictional." Yet, at no point does

the brief in opposition show any inaccuracy in the petition. We respectfully submit that contrary to such characterization the petition for writ of certiorari has been prepared with studied accuracy.

2. The questions presented do arise on the record.

Respondents argue without support in the record that the questions presented do not arise. They present no substantial argument why the cause should not be reviewed by this Court if, as is the fact, the questions are present.

3. As to employer negligence the cause is not governed by the Concurrent Findings Rule.

The basis of decision of the district judge that Atlass was liable under the Jones Act for the deaths of his seamen employees proximately caused by the breach of his duty to provide a safe means of ingress to the vessel (App. 79) was recognized by respondents (Brief of Petitioners-Appellees and Cross-Appellants, p. 78) and the Court of Appeals (App. B in the Petition for Writ of Certiorari, p. 4a).

As was shown in the petition, pages 6-7, 9, 19-20, the trial judge's findings (App. 78) and statements (App. 60-61) regarding Atlass's *personal* responsibility or *personal* negligence were made in the context of the limitation of liability issue. The trial judge stated that he made the finding in the context of privity and knowledge (TR. 1655-1657, Appellant's Brief 37-38) The only finding of fact in support of the conclusion that Atlass was not personally responsible was the fact that he was in Chicago at the time of the drownings in Detroit. (App. 78) The uncontroverted evidence established that prior to returning to Chicago he had been at the scene

and had had an opportunity to know of the conditions for access. (App. 17, 22, 26, 28, 31, 49) Respondent's counsel conceded that general conditions were the same when Atlass was present. (App. 30) The burden of proving want of knowledge was upon respondents.

There is a suggestion, at page 8 of respondent's brief that Atlass as Muth's employer was not chargeable with the hazardous "permanent conditions at the shipyard," which included the 32 inch gap, the stanchions and cross-bars, planking on the walkway and inadequate lighting. Such suggestion overlooks the doctrine that the duty to provide a safe place of employment is not limited to the employer's own premises. *Sinkler* v. *Missouri Pacific Railroad Co.*, 356 U.S. 326, 331, 332 (concurring opinion of Mr. Justice Clark), 78 S. Ct. 758; *Shenker* v. *Baltimore & Ohio Railroad Co.*, 374 U.S. 1, 7; 83 S. Ct. 1667; *Cf. Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 211-212, 83 S. Ct. 1185. These opinions recognize the non-delegable nature of this duty. Moreover, the evidence in the instant case was that the shipyard did not undertake to supervise, control and care for the crews of vessels that were left on board during repairs, (App. 33) and that when Atlass left he placed Frank Johnson in charge of the crew. (App. 29, 74).

4. The Court of Appeals did not apply the proper standard of review.

Respondents argue that the Court of Appeals merely made "corrective comments" and "correction of the findings," and that it merely reassessed Muth's and Darr's degree of intoxication. Then, so the argument progresses, in light of this new "predicate", the court

below properly redetermined the "real reason for the occurrence." (Brief in Opposition, pp. 9-16).

The "corrective comment" that Muth was in a helpless condition did not warrant a factual determination by the Court of Appeals that the sole proximate cause of his death was his own gross misconduct. *McAllister* v. *United States*, 348 U.S. 19, 75 S.Ct. 6.

Both the Court of Appeals and respondents err in re-evaluating the accessibility of the "inshore route" and inferring that Muth and Darr were negligent in failing to use it. The trial judge found that "access to the rail bed from shore was hazardous, particularly at night, whether it was accomplished from the walkway, by stepping across the gap, or from the dock where it was flush with the rail. * * * The north side of the railbed along part of which there was no gap, also was obstructed by scaffolding and littered with ropes and planks * * *." (App. 75, 76). This finding was supported by substantial evidence including photographs of the scene showing the presence of the scaffolding and debris taken on the day of the drowning. (Claimants' Ex. 40, 41, 42, *infra*, Additional App., pp. 1, 2 and 3, Received in evidence, Tr. of Proceedings, p. 94).

In undertaking to return to the vessel, Muth and Darr neither assumed the risk of the hazardous means of access, *Tiller* v. *Atlantic Coastline R. Co.*, 318 U.S. 54, 63 S. Ct. 444, nor can be deemed contributorily negligent, no safe way being provided. *Smith* v. *United States*, C.A. 4, 1964, 336 F. 2d 165.

5. Petitioner's point that any prior misconduct of Muth was rendered remote by an intervening agency has been in the case since the matter was in the trial court.

Respondents argue inaccurately and without regard for the record that petitioner raised this point for the

first time in the petition for rehearing below. The point was made in the trial court (R. 127), in appellants' brief in the Court of Appeals (pp. 49-52) and in the reply brief. (p. 16).

The point has never been that the intervening cause "bears the whole responsibility," as respondents say, but it is that the intervening cause renders the prior conduct remote.

The question in *McDonough* v. *Buckeye S. S. Co.*, 103 F. Supp. 473, 477 aff. 200 F. 2d 558, as stated by the trial court in that case, was whether "the plaintiff is precluded from recovery because of decedent's own misconduct." In *McDonough*, as well as in *Black* v. *New York N.H. and H.R. Co.*, 193 Mass. 448, and *Panor* v. *Northwestern Elevated Railway Co.*, 228 Ill. App. 162, 178, the prior negligence or wrong was not a proximate cause because of the intervening agency.

While Smith's negligence may not have been chargeable to Atlass under the decision in *Robinson*, nevertheless the failure to provide a safe means of ingress, which was also a proximate cause, was chargeable to him. *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U.S. 500, 506-507, 77 S. Ct. 443, 448-449.

Respondents fail to demonstrate the absence of conflict between the holding below and the Sixth Circuit in affirming *McDonough* v. *Buckeye Steamship Co.*, 103 F. Supp. 473, aff. C.A. 6th 1952, 200 F. 2d 558. *Robinson* v. *Northeastern S. S. Corp.*, 228 F. 2d 679, did not turn on the issue whether the employee's conduct was rendered remote by an intervening agency. Nor did it turn on the question whether the injured employee was in the scope of his employment. In fact, the same circuit

in *Trost* v. *American Hawaiian Steamship Co.*, 324 F. 2d 225, 228, recognized that the plaintiff's decedent, the helpless seaman in *Robinson*, was within the scope of his employment. The *Robinson* case turned on the question whether the negligence of a fellow employee who undertook to care for the helpless seaman, was chargeable to the employer. As we have many times repeated, Atlass's liability arises not from that negligence but from the breach of the non-delegable duty to provide a safe means of ingress, which the district judge clearly determined was a proximate cause. (App. 59, 79, Petition for Rehearing p. 7, Tr. 1664-1665) Apparently what respondents overlook is that some findings of fact can be more in the nature of conclusions of law and some conclusions of law can include findings of fact. They have omitted the conclusions of law from the appendix to their brief.

6. The subsidiary questions are important and may be decided here.

Respondents argue that the subsidiary questions upon which the petition concededly is not based need no response. The only response offered is an argument that life saving equipment (two life rings on the port rail *opposite* the starboard boarding area and life preservers below and on deck) were "readily available", and wouldn't have done any good anyway.

The subsidiary questions present important legal issues. As the Court of Appeals did not reach them, we did not regard them as sufficient in themselves to form the basis of our petition. Nevertheless, should this Court grant certiorari respondents advance no reason why this Court may not decide the subsidiary questions presented as well, thus bringing to a conclusion approximately nine years of litigation.

The power of this Court in reviewing a decision of the Court of Appeals on certiorari is not limited to the correction of error in a judgment entered below, but includes the power to make such disposition of the case as justice may at the time require. This Court has the power to dispose of all questions arising on the record. 28 U.S.C., §2106; *Story Parchment Co.* v. *Paterson Parchment Co.*, 282 U.S. 555, 567-568, 51 S. Ct. 248; *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508, 71 S. Ct. 470.

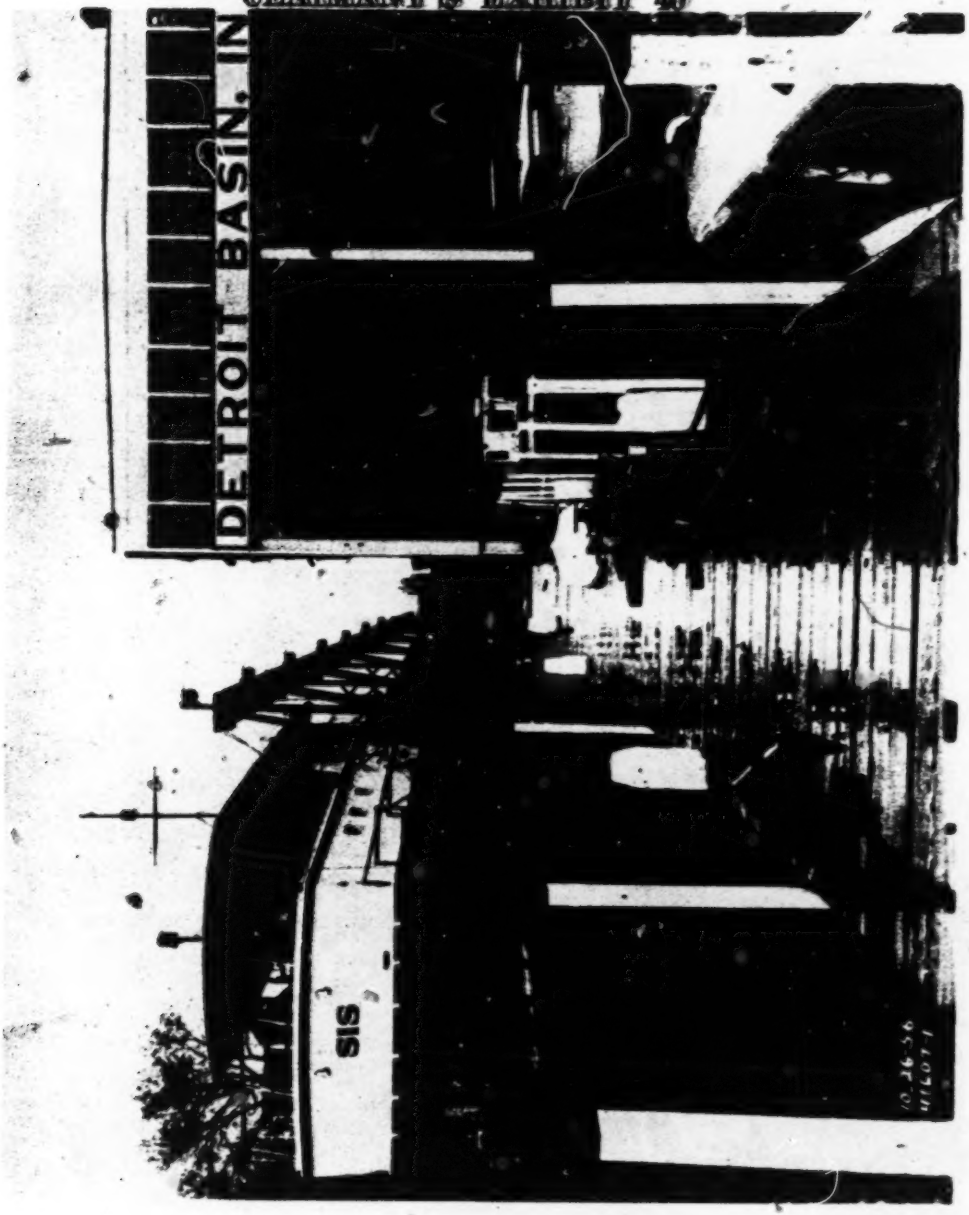
For the reasons stated in the petition, petitioner prays that this Court grant the writ of certiorari.

Respectfully submitted,

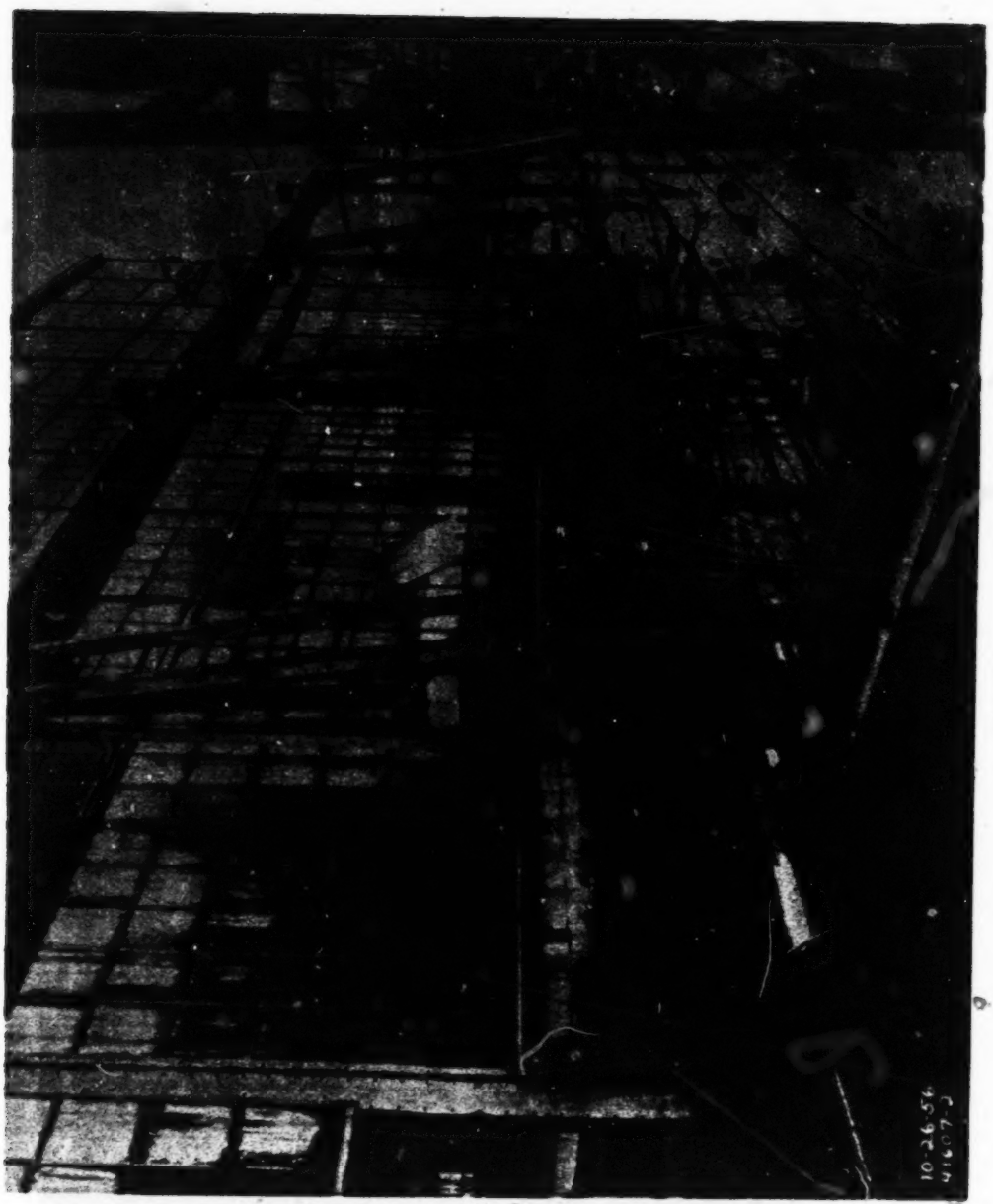
G. KENT YOWELL
Counsel for Petitioner

ADDITIONAL APPENDIX

CLAIMANT'S EXHIBIT 40



CLAIMANT'S EXHIBIT 41



CLAIMANT'S EXHIBIT 42